Supreme Court, U.S.
FILED
JAN 8 1972
E. ROBERT SEAVER, CLERK

No. 71-762

In the

Supreme Court of the United States

OCTOBER TERM, 1971

EDWARD HINES LUMBER CO.,
a Delaware corporation,

Petitioner,

vs.

CENTEX-WINSTON CORPORATION,
a Nevada corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JACK JOSEPH
69 W. Washington Street
Chicago, Illinois 60602
JEROME H. GERSON
DANIEL N. EPSTEIN
120 W. Madison Street
Chicago, Illinois 60602
JEROME H. TORSHEN
LAWRENCE H. EIGER
11 S. La Salle Street
Chicago, Illinois 60603
Attorneys for Respondent

YACKER, GERSON & EPSTEIN
JEROME H. TORSHEN, LTD.
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
ARGUMENT	4
I. The Court Below Correctly Relied on the Plain Meaning of the Language of Section 2(e)	4
II. The Decision of the Court Below is Not Inconsistent or in Conflict With the Decisions of This Court or Other Courts	7
CONCLUSION	12

TABLE OF CASES

American News Company v. Federal Trade Commission, 300 F.2d 104 (2d Cir., 1962), cert. denied, 371 U.S. 824 (1962)	7
Chicago Spring Products Co. v. United States Steel Corp., 254 F.Supp. 83 (N.D.Ill., 1966) aff'd, 371 F.2d 428 (7th Cir., 1966)	9
Federal Trade Commission v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968)	4, 7, 8
Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55 (1959)	7, 8, 9
Georgia v. Evans, 316 U.S. 159, 162-163 (1942)	4
Edward Hines Lumber Co. v. Centex-Winston Corporation, 447 F.2d 585 (7th Cir., 1971)	2
Edward Hines Lumber Co. v. Centex-Winston Corporation, Civil Action No. 70 C 808 (1970, unpublished)	2
In the Matter of American Greetings Corp., 49 FTC 446, 450 (1953)	8

PAGE

In the Matter of Appleton-Century-Crofts, Inc., 47 FTC 1371, 1375-76 (1951) 8

In the Matter of General Foods Corporation, 52 FTC 798 (1956) 8

In the Matter of Joseph A. Kaplan & Sons, Inc., 63 FTC 308, 1331-32 (1960), aff'd and modified, 347 F.2d 785 (D.C.Cir., 1965) 8

In the Matter of Luxor, Ltd., 31 FTC 658 (1940) 8

P. Lorillard Company v. Federal Trade Commission, 267 F.2d 439 (3d Cir., 1959), cert. denied, 361 U.S. 923 (1959) 7

R. H. Macey & Co. v. Federal Trade Commission, 326 F.2d 445 (2d Cir., 1964) 7

Schweggmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 388 (1951) 4

Sun Oil Co. v. Federal Trade Commission, 371 U.S. 505, 515 (1963) 4

United States v. Cooper Corp., 341 U.S. 600, 605 (1941) 4

STATUTES

Section 2(a), Robinson-Patman Act, (15 U.S.C. §13(a)) 6, 9

Section 2(b), Robinson-Patman Act, (15 U.S.C. §13(b)) 6, 7, 11

Section 2(c), Robinson-Patman Act, (15 U.S.C. §13(c)) 6

Section 2(d), Robinson-Patman Act, (15 U.S.C. §13(d)) 6, 8

Section 2(e), Robinson-Patman Act, (15 U.S.C. §13(e)) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

LEGISLATIVE AND OTHER AUTHORITIES

80 Cong. Rec. p. 9418, June 15, 1936 6

Federal Trade Commission Guidelines, 1 CCH Trade Reg. Rep. ¶4003 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-762

EDWARD HINES LUMBER CO.,
a Delaware corporation,

Petitioner,

vs.

CENTEX-WINSTON CORPORATION,
a Nevada corporation,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

The respondent, Centex-Winston Corporation, respectfully prays that this Court deny the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 25, 1971.

OPINION BELOW

The opinion of the Court of Appeals, 447 F.2d 585 (7th Cir., 1971) and the opinion of the District Court, Civil Action No. 70 C 808 (1970, unpublished), appear in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Section 2(e) of the Robinson-Patman Act (15 U.S.C. §13(e)) prohibits discriminations in the furnishing of delivery services and facilities in connection with the processing, handling, sale or offering for sale of a commodity.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Robinson-Patman Act are set forth in the Petition at p. 2 and in the Appendix thereto at pp. A1-A4.

STATEMENT

Petitioner has failed to set forth the essential allegation of the complaint which the court below held state a cause of action under Section 2(e) of the Robinson-Patman Act. The complaint alleges that respondent is a builder and developer of single and multiple family residential projects in the Chicago metropolitan area and competes therein with other builder-developers. Petitioner is a fully integrated producer, fabricator, wholesaler and retailer of lumber products which move in interstate commerce from forests and production facilities

outside Illinois via petitioner as a conduit to respondent and other builder-developers in the Chicago metropolitan area.

The complaint further alleges that builders and developers such as respondent rely upon lumber deliveries to enable them to resell such lumber in completed homes; that from May, 1968 through August, 1969 petitioner, in violation of Section 2(e), continuously discriminated against respondent by delivering lumber behind the agreed upon schedules to it while delivering like goods to respondent's competitors in preference to respondent, and that by virtue of such discrimination, respondent was injured in its business and property.

Petitioner's reference to the proceedings in the Circuit Court of Cook County (Pet. p. 3) is both misleading and irrelevant. Respondent's voluntary dismissal of the counterclaim in that court, pursuant to an agreement with petitioner, specifically states that it is without prejudice to respondent's right to proceed against petitioner.

ARGUMENT

I. The Court Below Correctly Relied on the Plain Meaning of the Language of Section 2(e)

The decision of the court below is compelled by the clear language of the Robinson-Patman Act and employs principles of statutory construction consistently applied to the federal antitrust statutes. This Court has repeatedly held that the words of the statutes are to be taken in their usual and customary meaning and that the courts can not engraft thereon limitations or restrictions which Congress did not see fit to include. *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968); *Sun Oil Co.* v. *Federal Trade Commission*, 371 U.S. 505, 515 (1963); *Schweggmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 388 (1951); *Georgia* v. *Evans*, 316 U.S. 159, 162-163 (1942); *United States* v. *Cooper Corp.*, 341 U.S. 600, 605 (1941).

The court below found the provisions of Section 2(e) to be written in plain and unambiguous language. Section 2(e) covers the furnishing of "any services or facilities connected with the processing, handling, sale or offering for sale" of a commodity other than on "proportionally equal terms." The words of the statute demonstrate its scope. The language does not include or even suggest that (as petitioner urges) only discriminations in price or those concerning advertising and promotional allowances are within the statutory prohibitions.

Had Congress sought to limit Section 2(e) to price discriminations or discriminations in the furnishing of advertising and promotional services, it could have done

so in a few words or a single phrase. The very language of the statute, however, indicates that such was not the purpose of Congress.

One of the most prominent discriminatory abuses before the Congress in 1936 was the use of "advertising allowances" as a disguise for price discriminations. It was not, as petitioner urges, the *only* discrimination with which Congress was concerned. The draftsmen of the Robinson-Patman legislation recognized that the variety in forms of discrimination was limited only by the ingenuity of the sellers and their favored customers. The Robinson-Patman bill was therefore phrased in language broad enough to cover not merely "advertising" or "promotional" services, but all other forms of discriminations in services and facilities relating to handling, processing and sale. The court below correctly stated:

> "The use of the terms 'processing' and 'handling' in Section 2(e) shows that Congress meant to ban the use of discriminatory practices, even though not of a typically sales promotional nature." (147 F.2d at 588)

The court below summarized the legislative history as follows:

> "Section 2(e) should not be confined to the conventional type of promotional services such as window displays, demonstrators, exhibits and prizes, for Section 2(d), and therefore its companion Section 2(e) was *'made intentionally broader than this one sphere [payments for advertising and promotional services] in order to prevent evasion in resort to others [non-advertising and non-promotional services] by which the same purpose might be accomplished* * * *.'" 80 Cong.Rec. 9418. Section 2(e)

> was meant to cover advertising, sales, and other services and facilities * * *" Idem." (447 F2d at 587, emphasis supplied)

With equal clarity, the Congressional draftsmen demonstrated that Section 2(e) was not to be limited merely to price and price related discriminations. The phrase "proportionally equal terms" found in Section 2(e) was defined by Congressman Utterback as follows:

> "The bill also prohibits the seller from furnishing services or facilities to the purchaser in connection with the processing, handling, or sale of the commodities concerned unless they are accorded to all purchasers on proportionally equal terms. Again the last phrase has reference to the several purchasers' equipment and ability to satisfy the terms upon which the offer is made, or the services, or the facilities furnished to any other purchases." (80 Cong.Rec. p. 9418, June 15, 1936)

It would be incongruous to assume that Congress, having devoted three sections (Sections 2(a), 2(c) and 2(d)) to price and price-related discriminations would deliberately enact yet a fourth section to cover the same ground as the first three, but would fail to include in that fourth section any restrictive language to accomplish that which petitioner argues was the Congressional purpose.

Finally, the language of Section 2(b) of the Act demonstrates that both price and non-price discriminations were within the contemplation of Congress. Section 2(b) gives the seller the right to rebut a *prima facie* case of discrimination by showing that it acted in good faith to meet competition. This defense is provided with respect to both price and nonprice discriminations. Section 2(b) provides in pertinent part:

"Provided, however, that nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price *or the furnishing of services or facilities to any purchaser* or purchasers was made in good faith to meet an equally low price competitor, *or the services or facilities furnished by a competitor.*" (Emphasis supplied)

Clearly, were only price related discriminations within the scope of Section 2(e), it would be unnecessary for Section 2(b) to refere to both "price" and "services or facilities".

II. The Decision of the Court Below is Not Inconsistent or in Conflict With the Decisions of This Court or Other Courts.

Petitioner relies for support on decisions of this Court and lower courts which considered discriminations in advertising and promotional allowances.* Relying upon out of context quotations, petitioner concludes that the decisions restrict Section 2(e) to advertising and promotional services and facilities. However, each of petitioners' decisions dealt specifically with discriminations in the area of advertising and promotion, and therefore employed language to address the problem in that area. In none of those decisions did this Court or any other court hold, as

---

* *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968); *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959); *P. Lorillard Company* v. *Federal Trade Commission*, 267 F.2d 439 (3d Cir., 1959), cert. denied, 361 U.S. 923 (1959); *American News Company* v. *Federal Trade Commission*, 300 F.2d 104 (2d Cir., 1962), cert. denied, 371 U.S. 824 (1962); *R. H. Macey & Co.* v. *Federal Trade Commission*, 326 F. 2d 445 (2d Cir., 1964).

petitioner urges, that *only* advertising and promotional discrimination are within the prohibitions of Section 2(e).*

Petitioner also urges that this Court in *Simplicity Pattern* and *Fred Meyer*** limited the scope of 2(e) to price and price related discriminations. *Fred Meyer*, however, dealt specifically with discriminations in the form of advertising allowances under Section 2(d) and, in *Simplicity Pattern*, this Court specifically stated:

> "Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations." (360 U.S. at 65).

---

* Petitioner has similarly misconstrued the 1969 FTC Guidelines by neglecting to include in its quotation therefrom that part of the Guidelines which states: "They are not meant to cover every situation." Petitioner similarly excludes the Guidelines' own examples which include references to "special packaging or package size" and "accepting returns for credit", both clearly outside the realm of advertising and promotion (1 CCH Trade Reg. Rep. ¶4003). The Federal Trade Commission, in holding that discriminations in package sizes and accepting returns for credit violate Section 2(e), demonstrated that the Section is not limited to services directly involved in the promotion of the resale of the seller's product. Like the deliveries of lumber, package size and returns for credit may be associated with the original sale transaction between the supplier and customer. However, they are connected with and affect the ability of the customer to handle, process and resell the goods. *In the Matter of General Foods Corporation*, 52 FTC 798 (1956); *In the Matter of Luxor, Ltd.*, 31 FTC 658 (1940); *In the Matter of Appleton-Century-Crofts, Inc.*, 47 FTC 1371, 1375-76 (1951); *In the Matter of American Greetings Corp.*, 49 FTC 446, 450 (1953); *In the Matter of Joseph A. Kaplan & Sons, Inc.*, 63 FTC 308, 1331-32 (1960), *aff'd and modified*, 347 F.2d 785 (D.C.Cir., 1965).

** *Federal Trade Commission* v. *Simplicity Patterns*, 360 U.S. 551 (1959); *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

Similarly, petitioner misconstrues the decisions of the District Court and the Court of Appeals in *Chicago Spring Products Co.* v. *United States Steel Corp.*[***] as holding that differences in delivery services are not within the scope of Section 2(e) but are subject only to Section 2(a). That case, as the court below correctly stated, dealt not with delivery services, but with freight allowances and rebates which, by specific statutory language, are within the scope of Section 2(a).

Petitioner attempts to buttress its petition by urging that a host of dire effects will befall both it and distributive practices in general if industry cannot freely discriminate among its customers in furnishing delivery services. Petitioner foresees great harm if customers sue their suppliers under Section 2(e) ". . . demanding proportionally equal treatment and treble damages for alleged injuries." (Pet. 14) Because the "cost justification" and "injury to competition" defenses in price discrimination cases under Section 2(a) are not similarly available under Section 2(e), petitioner urges that application of the latter section to delivery services will "create an impossible marketing situation." (Pet. 14).

The court below, which considered this parade of distributive horribles viewed, the situation with considerably less alarm than petitioner. The court, relying upon *Simplicity Pattern,* stated:

> "Defendant's argument that its business would suffer if Section 2(e) were applied to discriminatory deliveries was answered in *Federal Trade Commission* v. *Simplicity Pattern,* 360 U.S. 55. After

*** 254 F.Supp. 83 (N.D.Ill., 1966), *aff'd* 371 F.2d 428 (7th Cir., 1966).

> noting that one of the purposes of Section 2(e) was to condemn secret discriminations, the Supreme Court pointed out that courts are not in a position to review the economic wisdom of Congress, which apparently intended to force sellers 'to confine their discriminatory practices to price differentials, where they can be more readily detected and where it would be much easier to make accurate comparisons of any alleged costs savings' 360 U.S. pp. 67, 68" (447 F.2d at 588)

The decision of the lower court is supported not only by the statutory language and legislative history but by economic reality as well. The scope of Section 2(e) is not limited to price and price related discriminations in advertising and promotion because the methods of discrimination in marketing are not so limited. As stated by the court below:

> ". . .a discrimination in the furnishing of deliveries would impede the resale of the commodity as alleged in this complaint. It cannot be persuasively said that the continuous and consistent variances in these delivery times were not connected with the resale of the lumber within the meaning of Section 2(e)." (447 F.2d at 588)

Obviously, a supplier could charge all of his customers the same price and give each proportionately equal advertising and promotional allowances or services, and still, by discriminating in delivery services, work the most serious harm to disfavored customers in their resale of supplier's goods. Thus, for example a supplier of turkeys could charge an identical same price to all of its retail grocer customers and provide them with advertising on a proportionally equal basis. But if the supplier delivered turkeys to a supermarket on the Monday before

Thanksgiving and to a small grocer on Friday, there would be an obvious effect on the latter's turkey sales regardless of price or advertising benefits. Similarly, if a publisher provides all of its bookstore customers with the same advertising and promotional material for a new bestseller, but delivers the book to some dealers two weeks after it has been released to others, the saleability of the book in the hands of disfavored dealers is vastly diminished.

Moreover, petitioner will not be defenseless of the 2(e) is applied to delivery service discriminations. As the court below recognized, petitioner may be able to show that it did not actually discriminate or that its discriminations were *de minimus*. Petitioner may also escape liability if it can show that its services were available to respondent on terms proportionately equal to other builder developers or that (under Section 2(b)) it acted in good faith to meet competition. Bacause these latter issues can be resolved only by trial, the Petition herein is premature. If this Court is to consider the application of Section 2(e) to delivery services, it ought to do so on a record of evidence in the trial court rather than on a motion to dismiss the complaint. Moreover, the successful assertion of the foregoing defenses might obviate the necessity for a hearing by this Court as to the application of Section 2(e) to discriminations in delivery services.

CONCLUSION

By virtue of the foregoing, Respondent respectfully prays that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

JACK JOSEPH
69 W. Washington Street
Chicago, Illinois 60602

JEROME H. GERSON
DANIEL N. EPSTEIN
120 W. Madison Street
Chicago, Illinois 60602

JEROME H. TORSHEN
LAWRENCE H. EIGER
11 S. La Salle Street
Chicago, Illinois 60603
Attorneys for Respondent

YACKER, GERSON & EPSTEIN
JEROME H. TORSHEN, LTD.
Of Counsel